

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF NEW YORK

UNITED STATES OF AMERICA

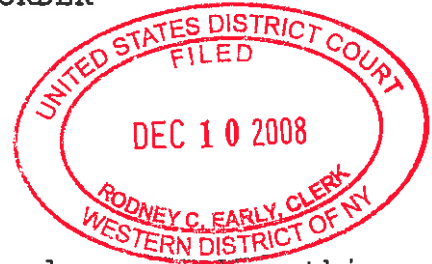
v.

00-CR-6139CJS

TIMOTHY GIVENS

ORDER

Defendant.



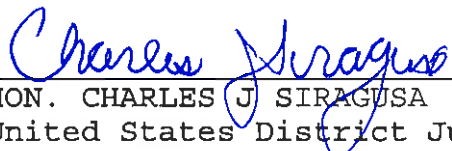
In accordance with the Second Circuit's order remanding this case pursuant to *United States v. Regaldo*, 518 F.3d 143 (2d Cir. 2008), to give this Court an opportunity to indicate whether it would have imposed a non-Guidelines sentence knowing that it had discretion to deviate from the Guidelines based upon the Supreme Court's holding in *Kimbrough v. United States*, 128 S.Ct. 558 (2007), which held that district courts, in imposing sentence, may consider the disparity between the Guidelines' treatment of crack and powder cocaine offenses,

NOW, having fully considered that this Court may consider in imposing sentence the disparity between the Guidelines ranges applicable to cocaine and cocaine base offenses, and having heard and considered the arguments of the parties, and upon review of each of the sentencing factors listed in 18 U.S.C. § 3553(a), this Court hereby declines to resentence the defendant for the reasons

set forth in the attached bench decision transcript. Further, the Court determines that the sentence originally imposed was sufficient, but not greater than necessary, to comply with the purposes of sentencing as set forth in 18 U.S.C. 3553(a).

IT IS SO ORDERED.

Dated: December 10, 2008


HON. CHARLES J. SIRAGUSA
United States District Judge

cc: Donald M. Thompson, Esq.
Counsel for Timothy Givens

1 UNITED STATES DISTRICT COURT
2 WESTERN DISTRICT OF NEW YORK
3
4

5 - - - - - X
6 UNITED STATES OF AMERICA) 00cr6139
7)
8 vs.)
9 TIMOTHY GIVENS) Rochester, New York
10) December 3, 2008
11 Defendant.) 3:00 p.m.
12 - - - - - X

10
11 TRANSCRIPT OF PROCEEDINGS
12 BEFORE THE HONORABLE CHARLES J. SIRAGUSA
13 UNITED STATES DISTRICT JUDGE

14 TERRANCE P. FLYNN, ESQ.
15 United States Attorney
16 BY: DOUGLAS GREGORY, ESQ.
17 Assistant United States Attorney
18 6200 Federal Building
19 Rochester, New York 14614

18 DONALD M. THOMPSON, ESQ.
19 16 W. Main Street, Suite 243
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21 Appearing on behalf of the Defendant

21 Carrie Chartier, USPO

22
23 COURT REPORTER: Karen J. Bush, Official Court Reporter
24 Kenneth B. Keating Federal Building
25 100 State Street
Rochester, New York 14614

P R O C E E D I N G S

* * *

THE COURT: For the record, this is matter of the United States versus Timothy Givens. You are Timothy Givens, is that correct?

THE DEFENDANT: Yes.

THE COURT: And you're appearing with your attorney, Mr. Thompson.

THE DEFENDANT: Yes.

THE COURT: The Court notes the presence of Mr. Gregory on behalf of the government. This case is before the Court on the summary order issued by the Second Circuit in which the Second Circuit said, quote, "Accordingly, we now vacate Givens and L. Blue's sentences and remand pursuant to *United States vs. Regalado*, to allow the district court to determine whether it would impose a different sentence on them, as well as on R. Blue, given its discretion to depart from the Guidelines for crack cocaine." Referring to *United States vs. Regalado*, in pertinent part the Second Circuit stated, "We therefore adopt the Crosby mechanism and apply it here where a defendant has not preserved the argument that the sentencing range for the crack cocaine offense fails to serve the objectives of sentencing under 3553(a), we will remand to give the district court an opportunity to indicate whether it would

1 have imposed a non-Guideline sentence knowing that it had
2 discretion to deviate from the Guidelines to serve those
3 objectives. If so, the Court should vacate the original
4 sentence and resentence the defendant. If not, the Court
5 should state on the record that it is declining resentence and
6 should provide an appropriate explanation for this decision.
7 On appeal, if we have not already done so, we will review the
8 sentence for reasonableness."

9 In this case, I did receive a memo from the
10 government in which the government opposes any reduction,
11 although I don't know if I agree with your reasoning, Mr.
12 Gregory. You suggest that because back on, I believe, August
13 3rd of 2005, the Court denied and determined that no
14 resentencing was necessary on the *Crosby* remand, because the
15 Court decided that it would essentially have imposed the same
16 sentence since the Court necessarily determined that a
17 non-Guideline sentence was not appropriate --

18 MR. GREGORY: The reason I came to that
19 conclusion, and it is based upon some inference, is that when
20 the case came back on *Crosby*, the Court had the authority to
21 while taking into account the Guidelines sentence Mr. Givens
22 from anywhere from 10 years the statutory minimum up to life
23 and chose to continue its sentence as the sentence previously
24 imposed, so the inference that I make there is that it would
25 continue to do so.

1 THE COURT: But I think the one flaw in that, I
2 think what the Circuit seems to be saying is that at the time
3 you originally sentenced Mr. Givens, at the time you denied
4 resentencing him on the *Crosby* remand you didn't know you had
5 the authority to depart or, excuse me, to give a non-Guideline
6 sentence based on the crack powder differential now we're
7 telling you that you do.

8 MR. GREGORY: True, but, frankly, you had the
9 discretion under *Crosby* to depart from the Guidelines
10 practically for any reason as long as those reasons were stated
11 on the record.

12 THE COURT: Okay. In any event, the Court
13 determines that whole point of these regular remands are under
14 Circuit's direction that the district court should consider
15 whether a non-Guideline sentence is appropriate, specifically
16 on the differential between the crack and powder differential.
17 Before we address that, you also in your papers suggest that
18 the Court should anticipate a *Whitley* application and should
19 adopt the government's logic that the determination in *Whitley*
20 is in opposite to what we have here. Specifically the Court
21 declines to do so. The Court is aware that there is a case
22 currently pending before the Circuit, the Leroy Kelly case,
23 which is dealing with exactly the issue you're suggesting
24 whether or not the statutory minimum on the drug charge which
25 exceeds five years statutory minimum on the gun charge trumps

1 the gun charge and means that the consecutive time is not
2 mandatory. In any event, the Court declines to address that
3 because that exact issue, I think is being addressed by the
4 Circuit I think this month, so the Court declines to address
5 that. We're turning now --

6 MR. THOMPSON: Can I make a record on that point?

7 THE COURT: Yes.

8 MR. THOMPSON: I do agree that because we're still
9 pending here on appeal that the *Whitley* determination would
10 apply to this case and although I disagree with the
11 government's reasoning with respect to *Whitley*, I agree that
12 that is a case that is applicable here. I think the case that
13 you were thinking about was *Williams*, which is factually
14 directly on point with this case, which was argued back in
15 July.

16 THE COURT: You're right.

17 MR. THOMPSON: And we're still waiting for a
18 decision.

19 THE COURT: You're right, *Williams*, I said Kelly,
20 it is *Williams*.

21 MR. THOMPSON: And for basically the same reasons,
22 the same arguments that were made in *Williams* with respect to
23 *Whitley* I argue that applies to this case.

24 THE COURT: I decline to rule. You're right, it's
25 the *Williams* case, I was informed it is being argued this

1 month.

2 MR. THOMPSON: *Williams* was argued in July. We're
3 awaiting a decision still out of the Second Circuit. There are
4 other cases.

5 THE COURT: I was informed by the Public Defender,
6 Ms. Mariano, there was going to be some argument on this case,
7 an amicus brief.

8 MR. GREGORY: There was one filed in mid November.

9 THE COURT: In any event, the Court, to the extent
10 that both are asking me to make a ruling, declines to do so.
11 It was remanded specifically on *Regalado*, the Court declines to
12 anticipate what the Second Circuit is going to do on that case.
13 So, now we turn our attention to the *Regalado* remand.

14 Mr. Givens, I did receive your submission to me
15 and I read it carefully. Now, I see your family is in here.
16 And as they may or may not be aware, but I'll explain it to
17 them, what the Second Circuit did was send this back to me to
18 consider whether a non-Guideline sentence would be appropriate
19 based on the differential between crack and powder. So your
20 family understands, the sentences are more severe. The ratio
21 at least before the November 2007 change was 100 to 1 between
22 crack and powder and the Circuit is directing district courts
23 -- the Supreme Court case in *Kimbrough* said, listen, you have
24 the authority to depart on that differential, on that alone --
25 depart is the wrong word, issue a non-Guideline sentence.

1 However, again, relying on *Crosby*, and it says, "where a
2 defendant has not preserved the argument, the sentencing range
3 for the crack cocaine defense fails to serve the objectives of
4 sentencing under Section 3553(a) we will remand to give the
5 district court an opportunity to indicate whether it would have
6 imposed a non-Guideline sentence knowing it had the discretion
7 to deviate from the Guidelines to serve those objectives."
8 I've considered exactly that and I've determined that I would
9 have imposed the same sentence, that is, I would not have
10 imposed a non-Guideline sentence, and I'll explain to you why.
11 In your particular case, the crack powder differential really
12 does not come into play. I went back and carefully reviewed
13 the presentence report, refreshed my recollection as to the
14 trial testimony, reviewed the submissions that were filed at
15 sentencing. In the original presentence report in paragraph 18
16 -- and the Court recalls the testimony of Marino Guerrero. He
17 was the main supplier of cocaine. There were others and there
18 were objections made to the others, but Mr. Guerrero testified
19 at trial he was the main supplier of cocaine to the
20 organization of which you were a member, that was the
21 testimony. And Guerrero testified that between December of
22 1995 to June of 2000 he sold more than 75 kilograms of cocaine
23 to Blue. If you go under -- so, I'm setting aside the whole
24 cocaine base amount. And you recall at sentencing that I found
25 that because your relevant conduct involved in excess of 1.5

1 kilograms of cocaine base, your offense level based on that was
2 38. If you go to the new Guidelines, and if you go to 2D1.1 if
3 I just consider the cocaine -- in other words, I want to make
4 it clear my understanding is the Circuit is saying there is
5 this differential between crack cocaine and powder cocaine in
6 terms of the severity of the sentence, that at the time Mr.
7 Givens was originally sentenced when he was back here on a
8 Crosby remand, counsel and Mr. Givens were unaware that based
9 on this differential alone that he could seek a non-Guideline
10 sentence and the Court at the time was unaware at the time of
11 the original sentencing and at the time of the Crosby remand on
12 August 3rd of 2005 that it could give a non-Guideline sentence
13 based on this differential between crack cocaine and powder
14 cocaine. However, just considering the powder cocaine that was
15 involved in the conspiracy, that is, that was within the scope
16 of the conspiracy in which you participated, it was reasonably
17 foreseeable to you, the Guidelines indicate that at least 50
18 kilograms but less than 150 kilograms of cocaine equate to an
19 offense level of 36. If I go back to the original presentence
20 report and just consider the cocaine with a base offense level
21 of 36, I increase your offense level by 4 for a role in the
22 offense, and there is no issue as to that at this point, your
23 criminal history category I found to be III, if I go to the
24 Guideline tables just based on the powder cocaine with an
25 offense level of 40 and a criminal history category of III, the

1 recommended range under the advisory Guidelines, which I found
2 to be reasonable on the *Crosby* remand is the same as it was on
3 sentencing of 360 to life. You'll note in the table, with a 42
4 as an offense level and a criminal history category of III, the
5 recommended range is 360 to life. So the reason, and again,
6 I'm carefully looking at the *Crosby* or, excuse me, at the
7 *Regalado* case, as I did on the *Crosby* remand, I now again
8 consider all the sentencing factors set forth in 18 U.S.C.
9 Section 3553 as I have done twice before. In 18 U.S.C. Section
10 3553 I considered the Court should impose a sentence
11 sufficient, but not greater than necessary to comply with the
12 objectives of sentencing as set forth in 18 U.S.C. Section
13 3553. I've considered again the nature and circumstances of
14 your offense, your history and characteristics, I've considered
15 the need for the sentence imposed to reflect the seriousness of
16 your crime, to promote respect for the law and provide just
17 punishment for the offense. I've considered the need for the
18 sentence imposed to deter criminal conduct, to protect the
19 public from further crimes on your part, to provide you with
20 whatever training or care or treatment you need in the most
21 effective manner. I've considered the sentences available
22 under the statute and those recommended under the advisory
23 Guidelines, and I've considered the need to avoid unwarranted
24 sentencing disparities among defendants with similar records
25 who have been found guilty of similar conduct. I've

1 specifically considered that in certain situations the
2 discrepancy between crack and powder might justify a
3 non-Guideline sentence, but in your case, I find, after
4 considering all the factors, again, that I would not, based on
5 that differential, impose a non-Guideline sentence but would
6 have imposed the original sentence. As I indicated the reason
7 is that in your case that differential really didn't matter.
8 Based on the findings which I made with respect to the
9 presentence investigation report and, again, I will indicate,
10 based on the testimony alone of Mr. Guerrero, which the Court
11 credited in the original sentence that your relevant conduct
12 involved -- excuse me, that the conspiracy in which you
13 participated and the amount which was foreseeable to you was in
14 excess of 75 kilograms, that alone equates to an offense level
15 of 36, with your criminal history category of III, the
16 recommended range under the advisory Guidelines is the same.
17 That is the decision of the Court. Mr. Thompson, you can have
18 an exception to the Court's ruling.

19 MR. THOMPSON: A few things, actually, if I could.

20 THE COURT: Certainly.

21 MR. THOMPSON: Since the Second Circuit vacated
22 Mr. Givens' sentence and we're back at least for this limited
23 resentencing, I believe that he should have an opportunity to
24 be heard at the time of sentencing.

25 THE COURT: He certainly can. It's a little

1 confusing, you point up to something that confused the Court,
2 it says, again, it says, I'm reading it, "we will remand to
3 give the district court an opportunity to indicate whether it
4 would have imposed a non-Guideline sentence knowing it had the
5 discretion to deviate from the Guidelines to serve those
6 objectives. If so, the court should vacate the original
7 sentence and resentence the defendant. If not, the court
8 should state on the record that it is declining resentence."
9 So, I don't know what the Circuit said in *Regalado* and has
10 repeated in other cases that I looked at juxtaposes with what
11 they said in this case, but, in any event, I certainly would
12 give -- I did read carefully your submission to me and I would
13 note that it was a lengthy submission and included several
14 letters attached to it.

15 THE DEFENDANT: Yeah.

16 MR. THOMPSON: I think he did a nice job of that.
17 I think he has refined it some as far as the statement he would
18 like to make to the Court.

19 THE COURT: I think you and your family should
20 understand, unless I'm wrong, the case is back in front of me
21 for a limited purpose to determine whether had I known at the
22 time I originally sentenced you that I had the discretion to
23 give a non-Guideline sentence based on this crack/powder
24 differential I would have done so. Go ahead.

25 MR. THOMPSON: Well, before he does, just on that

1 point, so the record is clear, I think the Court is mistaken on
2 that because of the intervening decision in *Whitley* and because
3 that is now the law. It's my contention the Court does not
4 have the election to disregard the current status of the law
5 upon this sentencing, so.

6 THE COURT: I'm missing you. We're talking right
7 now -- I understand your position on the gun charge.

8 MR. THOMPSON: Yes.

9 THE COURT: If I follow your position, and you can
10 certainly correct me if I'm wrong, on the gun charge all it
11 would mean it's no longer mandatory that I sentence 60 months
12 consecutive.

13 MR. THOMPSON: Yes.

14 THE COURT: I could, but it's no longer mandatory.

15 MR. THOMPSON: Yes.

16 THE COURT: I understand your position on that.
17 Go ahead, Mr. Givens.

18 MR. THOMPSON: And you're -- and if I understand
19 the Court's position, you're declining to make any ruling under
20 *Whitley* at this point.

21 THE COURT: I'm declining to make any ruling for
22 two reasons. First, that is not why the case was sent back to
23 me. It was specifically sent back from the Second Circuit for
24 a limited purpose, a *Regalado* remand, that is reason number
25 one; and, two, I'm declining to rule on that because the exact

1 issue is in front of the Circuit and were I to be persuaded by
2 your argument that it should be that, at least I should
3 consider it to be concurrent and I should sentence it
4 concurrent and the Circuit decides that the Government's
5 position is correct, then I would be venturing into an area
6 where I probably shouldn't go because I could obviously be at
7 odds with the Circuit.

8 MR. THOMPSON: I'm more concerned with deciding
9 that the Circuit has decided my position is correct and not
10 having preserved that position.

11 THE COURT: Let me make this clear, I fully
12 expect, I'm sorry, if the *Williams* case goes the way the
13 defense urges, this will be back in front of me yet again on
14 what I'm sure will be referred as *Whitley* remands. You may be
15 back in front of me again. But, because of the confusion --
16 and you do raise a point, the Circuit -- and I mentioned it --
17 indicated in their decision that, "accordingly, we now vacate
18 Givens' and Blue's sentence and remand pursuant to *United*
19 *States vs. Regalado* to determine whether it would impose a
20 different sentence on them." It does appear to be somewhat at
21 odds with what they said.

22 MR. THOMPSON: If I could. What I read this order
23 to mean was that they were vacating the sentence and what they
24 equated a resentence with would be a different sentence. You
25 know, if you go back to the other language it says if you

1 resentence, you should do this or that and it sounds like what
2 they're really saying, if you impose a different sentence this
3 is the procedure to follow. If you impose the same sentence,
4 you impose it, it's a resentence to the same thing.

5 THE COURT: It is -- it adds because it says here,
6 "accordingly, we now vacate the sentence." Yet in the regular
7 decision it says, "if the court decides to give a non-Guideline
8 sentence, then under that circumstance, it should vacate the
9 original sentence."

10 MR. THOMPSON: So, I don't know why they said
11 vacated here, but they did.

12 THE COURT: Let's go with that.

13 MR. THOMPSON: That is my point.

14 THE COURT: Tell me what you want to say.

15 THE DEFENDANT: Thank you, Judge.

16 THE COURT: You're following all of this, Mr.
17 Givens?

18 THE DEFENDANT: Yeah.

19 THE COURT: Because we're having some trouble. In
20 any event, go ahead.

21 THE DEFENDANT: I want to say that years ago after
22 my conviction, you know, Mr. Thompson came to visit me in
23 county jail, and before he left he said something to me that
24 I've held onto until this very day and that is, "always hope
25 for the best and expect the worst." And it's the very state of

1 mind that I stand here before you with today. Your Honor,
2 every one of us in this courtroom today has had the unfortunate
3 opportunity to endure some kind of personal adversity, whether
4 it be the death of a loved one, a failed marriage or
5 relationship, an unfortunate accident or, in my case,
6 incarceration in prison. But, through this experience, your
7 Honor, I've come to learn that it's no so much what you go
8 through in life, it's how you deal with the situation. And
9 what I mean by this, your Honor, is that you can either deal
10 with it with a negative attitude, which will only make what
11 you're going through worse or you can deal with it with a
12 positive attitude, which is what I have chose to do in my
13 situation. Your Honor, when I went to prison, I did so with a
14 positive attitude and while doing so --

15 THE COURT: Take your time, Mr. Givens.

16 THE DEFENDANT: -- and while doing so, I came up
17 with a motto that I live by that I quote to other inmates on a
18 daily basis and I always tell them to, I quote, make the best
19 of your time of incarceration and don't let it get the best of
20 you. And I also would tell them that it's hard -- I also tell
21 them it's hard to walk a straight line in a crooked prison
22 environment, but if you walk to with your head held high with a
23 positive attitude, it's more than likely you'll make it through
24 your prison term without falling off track. But if you walk
25 around with your head held down with a negative attitude, it's

1 more than likely you're going to fall off course and into
2 something that is going to get you killed or with more time in
3 prison. And I promote my philosophy to these guys because from
4 my experience these past six years, I've come to realize that
5 that's the only way to beat and defeat a negative situation is
6 to fight it with a positive attitude. Your Honor, I know that
7 yourself, along with many other federal judges, has had
8 opportunity to send a lot of men, young and old, to prison for
9 long periods of time according to the law. And I make mention
10 of this to you, your Honor, because after having an unfortunate
11 opportunity to be incarcerated in three federal penitentiaries
12 and being able to watch these guys be able to watch up close
13 and in person inmates beating and stabbing other inmates,
14 raping other inmates, pouring hot oil in their face and
15 disfiguring inmates for life, I can stand here before you
16 today, your Honor, with a straight face and honestly and
17 totally agree with you that there are some guys that need to do
18 every day and month and year in prison. Some even need the
19 death penalty or just plain to sit there in prison and rot, if
20 you ask me. But, I also have to say that I've had the blessed
21 opportunity to meet some guys that truly and sincerely took
22 advantage of every opportunity given to them in prison to
23 better themselves in every aspect of their lives. These guys
24 have become respected role models that are doing their time
25 with dignity and hope of one day getting another opportunity of

1 their life with their kids and family, which they positively
2 earned and deserve and I'm proud to stand before you and
3 confess that I'm one of these redeemed men, your Honor.

4 Your Honor, I would like to respectfully address
5 Mr. Gregory. I would like to say, Mr. Gregory, I know it's
6 your right and your job to oppose any request for any type of
7 relief that me and my attorney petition for, and I sincerely
8 respect and understand that right of yours. But I would like
9 to say that I am no different or no better than you and vice
10 versa, you're no different or better than me. And I
11 respectfully say this because we have all sought after a second
12 chance as something in our lifetime. Let me give you a
13 scenario that I'm quite sure you would be able to relate to.
14 During my time I've been doing a lot of reading and studying
15 and I learned that a significant number of the judges and
16 lawyers and prosecutors today, they didn't pass a bar exam on
17 the first try. And I say that to make a point that just
18 because they failed on the first try doesn't mean that they was
19 a bad person or that they're not qualified or deserve to be
20 that judge, that prosecutor or that lawyer. What that first
21 failure means, they made a mistake somewhere along the way.
22 Give me one minute, your Honor.

23 THE COURT: Certainly.

24 THE DEFENDANT: Like I said, all the first failure
25 means, they made a mistake somewhere along the way. It happens

1 to all of us because we're humans. So, what do they do now
2 after failing their first bar exam? Well, they start all over
3 by regrouping and redeeming themselves, searching and finding
4 where they made the error and correcting it and I'm quite sure
5 you'll agree with me on this, Mr. Gregory, that some of today's
6 most prominent judges, prosecutors and lawyers didn't become
7 who and what they are today on their first bar exam, but for
8 some their second or third bar exam. That is where I'm at in
9 my life, seeking another opportunity in life to help raise my
10 daughters and help my mother by being a successful citizen at
11 the same time. Mr. Gregory, I took advantage of every
12 opportunity that the prison had to offer. I completed many
13 programs, maintained clear conduct, I've written 10 books in
14 which I've been offered several publishing deals for. I've
15 been blessed by my friend of more than 10 years Mr. Andrew
16 Brown, who is the President of the Bar Association and Ms.
17 Michelle Hutchinson with the hope of incorporating and starting
18 my own publishing and greeting card company since I've been
19 locked up, so all of this should clearly demonstrate to you and
20 to the courts to turn this negative into a positive end of the
21 story. So, all I ask of you, Mr. Gregory, instead of opposing
22 me, give me the benefit of the doubt and I promise I will not
23 disappoint you.

24 Your Honor, I would like to wrap this up by saying
25 that nobody in this world is perfect by any means. We've all

1 made some mistakes and we'll continue to do so in our lifetime.
2 Your Honor, I didn't come here expecting to go home today
3 because I'm not a narrow minded naive or non-realistic person.
4 But, I did come here today with hope of receiving a lesser
5 sentence. Your Honor, I know that the crime that I was tried
6 and convicted for may not call for a lesser sentence and a
7 lesser sentence may not seem just enough for the crime that I
8 was tried and convicted on, but I just want to say this, that a
9 lesser sentence seemed like a million years when you have a
10 daughter that you ain't seen in six years and you're not able
11 to be there to help care for her. It just seems like a lesser
12 sentence still seems like a lifetime. But, your Honor, I
13 accept full responsibility for not being able to be there for
14 my daughter like I'm supposed to be because that is not neither
15 your burden or the Court's, that's my problem. But I just
16 plead with the Court to give me another opportunity to be the
17 father that I desire and want to be that I haven't been able to
18 be and be that son and successful productive citizen that I'm
19 determined and destined to be. You know, your Honor, this
20 situation in prison has purposefully driven me and I ask you
21 for another chance and I promise you, I promise I won't let you
22 down. Thank you.

23 THE COURT: Thank you, Mr. Givens. I am impressed
24 by your words and but, as I tried to explain to you and your
25 family, this case was sent back to me for a specific purpose

1 and, as I tried to explain, the conspiracy for which you were
2 convicted involved -- there was a large scale drug conspiracy.
3 This wasn't a case where there was a small amount of drugs and
4 based just on the amount of cocaine, if I took that, if I was
5 sentencing you and it was after *Crosby* and after *Regalado*, I
6 would have to determine your relevant conduct and I'm trying to
7 explain the relevant conduct for the conspiracy in which you
8 participated as was established in the presentence report and I
9 adopted, certainly that statement in the presentence report as
10 a finding of fact involved 75 kilograms of cocaine, forgetting
11 the crack cocaine, and for the reasons I've explained, I'm
12 declining to resentence, imposing the same sentence that I did.
13 And it's not that I'm unsympathetic to you and really to your
14 family. I wish your words could be taken to anyone thinking
15 about getting involved in the conduct that you did because you
16 point to an all too true fact that you're doing the time, but
17 in a real sense, your family is, too. Unfortunately it took
18 something like this to make you realize this, but they're
19 suffering, maybe not to the same degree that you are, but
20 they're deprived of your companionship and holidays are there
21 and you're not there. But, unfortunately, that's the cost of
22 engaging in criminal conduct. And you also were convicted, you
23 know, of possessing a firearm in furtherance of a drug
24 trafficking crime.

25 In any event, the Court declines to resentence for

1 the reasons stated and imposes the same sentence that it
2 originally did and on remand that is 420 months on the drug
3 conviction and 60 months consecutive on the firearm conviction,
4 understanding full well that if the Circuit agrees with the
5 defense position in the *Williams* case, that I fully expect this
6 matter to be back in front of me on a *Whitley* remand and you
7 will argue and Mr. Thompson will argue that the 60 months
8 should run consecutively not concurrently. That is the
9 decision of the Court.

10 MR. THOMPSON: Can I, for the record, because the
11 Circuit's decision order says the sentence was vacated that may
12 be read to require me to at least upon pain of waiver to
13 reassert those claims that we had asserted in our original
14 sentencing submission. For example, the Court said earlier on
15 there was an adjustment in role of offense of 4, that is not in
16 issue. It's my contention that those points are as previously
17 raised are in issue and specifically the weight amount as being
18 a judge found as opposed to a jury-found fact, the amount
19 foreseeable being judge found as opposed to jury found and the
20 other determinations that we had argued in our previous
21 submission should be reasserted for purposes of the record at
22 this time as are fully asserted now.

23 THE COURT: I understand that and the Circuit can
24 clarify whether if the same sentence -- if the Court declines
25 to impose a new sentence whether that requires me to sentence

1 ab initio or not. In any event, the Court notes your
2 exceptions and notes to the extent the Circuit says, no, this
3 is a full-blown resentencing that you're asserting all the
4 objections you did initially, including the weight and role.
5 Thank you very much.

6 THE DEFENDANT: Thank you.

7 PROBATION: Just, Judge, to be clear, should a new
8 J&C be prepared and his supervised release reimposed?

9 THE COURT: I don't know. I guess what is the
10 government's position, Mr. Gregory?

11 MR. GREGORY: I think.

12 THE COURT: What did we do in the *Crosby* cases?

13 MR. GREGORY: All we did was submit an order
14 saying that you -- we submitted an order indicating that you
15 would not now impose a sentence that is nontrivially different
16 than the one you imposed and you signed it.

17 THE COURT: I noted this before when the issue has
18 come up before, "if so, the court should vacate the original
19 sentence and resentence the defendant." Now it doesn't say the
20 Court should vacate and resentence the defendant and give
21 specific reasons. On the other hand, it says the Court should
22 state on the record it's declining, and which I did, and should
23 provide an appropriate explanation for its decision. So any
24 order/J&C needs to explain the reasoning, it may be appropriate
25 to attach a copy of the transcript.

1 MR. GREGORY: Which is what we did on the *Crosby*
2 to the J&C.

3 THE COURT: I don't know if it's a full -- Mr.
4 Thompson points out what the Circuit said in its remand, I
5 pointed out what the remand said in *Regalado*, so it's the
6 government's position that it's not a full-blown resentencing.

7 MR. GREGORY: Judge, I think, frankly, we're
8 constrained by what the order from the Second Circuit says and
9 not what *Regalado* says. Follow me? *Regalado* gives some
10 instruction, but, unfortunately, from the Second Circuit, we
11 have this remand with an order in it. I think the Court may be
12 required to follow that order as opposed to what was said in
13 *Regalado*.

14 THE COURT: Let me ask you, what does that mean?
15 If that means follow the order and sentence -- let's play that
16 out. It's going to come up in other cases. If that is correct
17 and the sentence is vacated, there is no sentence, are we
18 proceeding from the get go again?

19 MR. GREGORY: No, I don't think we are.

20 MR. THOMPSON: It's my position we are.

21 MR. GREGORY: My position is we're definitely not
22 starting from scratch. We're back -- and after you decide this
23 one particular issue that has been sent back on *Regalado*, then
24 you impose the sentence, whether it's the same or whether it's
25 not at odds with what *Regalado* says, that is what the remand

1 says.

2 MR. THOMPSON: It it's my position you can't say
3 vacated and all the stuff applies, vacated is vacated.

4 THE COURT: Let's clarify what the defense
5 position is and government's position. Correct me if I'm
6 wrong, Mr. Thompson, and you, Mr. Gregory, your position is the
7 sentence is vacated that so that's what, that we start all over
8 again, that I have to review the presentence report? Is it
9 your position you can file additional objections?

10 MR. THOMPSON: Yes, it's my position that we're
11 back where we were before the initial sentencing took place.

12 THE COURT: And your position, we're not.

13 MR. GREGORY: Absolutely not.

14 THE COURT: I understand. The record is clear so
15 you both have your positions. The Court's position is they
16 start off by saying they're adopting the Crosby mechanism, the
17 Crosby mechanism was not a full blown starting sentencing all
18 over again. I understand the language of the Circuit. The
19 Court is specifically saying it would impose the same sentence.
20 To the extent that means I'm reimposing the same sentence, I'm
21 reimposing the same sentence. If the government believes based
22 on that the correct way is to proceed by order, proceed by
23 order. The defense has its objection. Thank you very much.

24 * * *

25 CERTIFICATE OF REPORTER

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2 I certify that the foregoing is a correct transcript of the
3 record of proceedings in the above-entitled matter.

4 /s Karen J. Bush

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Official Court Reporter

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